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IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1997

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SUPREME COURT, U.S.

ARTHUR CALDERON, Warden, Petitioner

v.

ROBERT MAURICE BLOOM, Respondent

CAPITAL CASE

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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21 pp

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TABLE OF CONTENTS

INTRODUCTION 2

FACTUAL SUMMARY 2

REASONS FOR DENYING THE WRIT 9

I. CALIFORNIA HAS WAIVED ITS RIGHT TO RAISE THE TEAGUE ARGUMENT IN THIS COURT AND HAS NOT PRESENTED ADEQUATE GROUNDS FOR REVIEW 10

II. THE COURT SHOULD REJECT CALIFORNIA'S REQUEST TO "SETTLE" AN ALREADY WELL-SETTLED AREA OF LAW . . . 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Bloom v. Calderon,
132 F.3d 1267 (9th Cir. 1997) passim

Bloom v. Vasquez,
840 F. Supp. 1362 (C.D.Cal. 1993) 12

Calderon v. Kelly,
127 F.3d 782 (9th Cir. 1998) 10

Card v. Dugger,
911 F.2d 1494 (11th Cir 1990) 8, 12

Hendricks v. Calderon,
70 F.3d 1032 (9th Cir. 1995) 12

Penry v. Lynbaugh,
492 U.S. 302 (1989) 9, 11

Sanders v. Ratelle,
21 F.3d 1446 (9th Cir. 1994) 8

Strickland v. Washington,
466 U.S. 668 (1984) 2, 14

Sullivan v Louisiana,
508 U.S. 275 (1993) 2

Teague v. Lane,
489 U.S. 288 (1989) 10

United States v. Clack,
957 F.2d 659 (9th Cir. 1992) 11

United States v. Johnson,
268 U.S. 220 (1925) 2

MISCELLANEOUS

Federal Appellate Practice Guide,
Ninth Circuit, § 10.11-10.12 11

INTRODUCTION

The State of California seeks certiorari on two issues not discussed in the Court of Appeals opinion below. The Circuit panel did not address these claims because the state had not raised them in the district court; for the same reason, the state is procedurally barred from pursuing the claims in this Court. Sullivan v Louisiana, 508 U.S. 275,278 (1993)(Court does not consider issue not properly preserved in lower court). The opinion now being challenged can hardly have created a conflict between the circuits on legal questions it did not decide nor even mention.

The Circuit opinion broke no new ground, but simply applied the long-established standard governing ineffective assistance of counsel claims to the facts as the appellate panel found them. Strickland v. Washington, 466 U.S. 668 (1984). The state's real quibble is with those factual findings, which are amply supported by the evidence. In any case, a party's discontent with the resolution of factual issues by a lower court does not constitute an adequate basis for a grant of certiorari. United States v. Johnson, 268 U.S. 220,227 (1925)("We do not grant a certiorari to review evidence and discuss specific facts.")

FACTUAL SUMMARY

On April 22, 1982, Robert Bloom, Jr. ("respondent"), a small, undernourished eighteen year old with no prior history of causing injury to others, shot and killed his father ("Bloom Sr.") on Bloom Sr.'s front porch, in the full view of neighbors.

Bloom v. Calderon, 132 F.3d 1267, 1269 (9th Cir. 1997). To anyone familiar with the details of Robert's life, that event would not have come as a surprise. Bloom Sr. was a professional con man with an extensive criminal history who alternately had used his child as a lure in his schemes to defraud women and had heaped beatings and psychological abuse on Robert, once deliberately breaking his son's arm in a fit of rage. Id. at 1273-74.

Robert had been abandoned to the care of his depraved father at the age of six by his mentally unstable mother, who herself gained a criminal record for crimes of violence. She reentered her son's life periodically thereafter in an attempt to exert an emotionally unbalanced control over him, on one occasion by placing a shotgun to his head. Id.

In the months before he killed his father, Robert, who suffers from substantial right hemispheric brain damage, was deteriorating psychologically. Id. at 1276. In November of 1981, he was arrested for a bizarre incident in which he pulled out a pellet gun at a church meeting. He was thereafter diagnosed by a court-appointed psychiatrist as suffering from a mental illness which rendered him prone to psychotic episodes and posing an extreme danger to himself and others. Id. at 1274. The psychiatrist's recommendation that he be placed in psychiatric therapy at a locked facility was tragically ignored, and Robert was released on probation. Id. Disaster soon followed.

What makes this case truly heartbreaking is that when he

exploded respondent did not simply kill his life-long tormentor; within five minutes of shooting his father, he had slain his stepmother and nine year old stepsister, with whom he had close and affectionate relationships. It was these deaths that made the leveling of capital charges legally possible.

Had the adversarial system properly functioned in this case, the defendant's jury would have confronted complex and subtle issues of fact and law. In the guilt phase, those included whether the elements of premeditation and deliberation or malice aforethought could be found in a mind twisted by a lifetime of physical and psychological abuse, serious illness, and brain damage, particularly in the light of the preexisting psychiatric diagnosis that had predicted Robert's paroxysm of violence.

If, after the jury had considered all the relevant evidence on this issue, it were to reach a penalty phase, it would have faced the wrenching question of whether society should teach its citizens not to kill children by killing one who, at the time of these offenses, was little more than a child himself, and whose cognitive and emotional capacities had been destroyed by those very persons whose duty it was to nurture them. Even the prosecution did not feel that this case demanded the death penalty, for it had offered a sentence of life without parole in pretrial negotiations.

As the Ninth Circuit has now held, a trial worthy of the issues in this case has yet to occur. Id. at 1278. Respondent did not receive the effective assistance of counsel to which he

was entitled, because the psychiatric defense presented on his behalf by his appointed counsel, Sherwin Edelberg, was a shambles. Although he obtained court approval for an examination of Robert by a psychiatric expert soon after entering the case, Edelberg failed to have the examination done for a year, while lying to the state trial court that the process was underway. Id. at 1271.

While Edelberg would later state he delayed the examination in the hope of obtaining some evidence of "irrationality" on Robert's part, he was so inattentive to the case that he remained unaware his client had attempted suicide in the Los Angeles County Jail and was diagnosed by the staff there as suffering transitory psychotic episodes, including auditory and visual hallucinations. Id. at 1274. Nor during this year did Edelberg investigate his client's psychological or family history or obtain the cornucopia of evidence of abuse, brain damage, and mental illness such an investigation would have unearthed. Id. at 1273-77.

On the eve of trial, Edelberg asked a law student working in his office to obtain the report of his psychiatric expert, Dr. Arthur Kling, to whom the lawyer had never spoken. Id. at 1271-72. When Edelberg's clerk discovered the expert had never been notified of his appointment, much less given instructions on conducting an examination, Edelberg directed the student to prepare materials and instructions for the examining psychiatrist, who had little forensic experience. Id. at 1272.

The student's instructions asked Kling to consider mental state defenses of "diminished capacity" that had been abolished in California, rather than the ones which logically would be offered in this case. Id. Kling, for his part, had asked the lawyer to provide "all relevant data, psychiatric and social" and "any additional information that might be available from the social history, family history, medical history." Id.

That information was not forthcoming.[1] Lacking the most critical data relating to respondent's background and personal history, including the neuropsychiatric testing he had requested, but which Edelberg never ordered,[2] Kling conducted an hour and a half interview and wrote a report that concluded there was no evidence to support the defenses he had been asked to consider. Id. The Ninth Circuit characterized the report Kling issued after his abbreviated meeting with Robert as "devastating" to respondent. Id.

Not surprisingly, the prosecution on cross-examination converted Kling into its own witness simply by introducing into evidence his initial and wholly defective report. Id. at 1272-73.

"Ranting and raving" that he had been poorly served by Edelberg in the guilt phase, as he had, Robert demanded and

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[1] The Circuit lists the small number of documents provided to Kling in its opinion at page 1272. The Attorney General suggests, without explaining how the limited material provided could have led to a meaningful review by Kling, that Kling got what he needed. (Petition for Certiorari ("Cert. Pet.") at 11).

[2] After trial, such testing revealed Bloom suffers from "striking, consistent, and clear evidence of cognitive and sensori-motor deficits, brain dysfunction and brain damage."

received from the trial court the right to seek his own death from the jury. Representing himself, both he and the prosecutor told the jury that there was no evidence of mitigation in the record. Of course, there would have been an overwhelming amount had Edelberg acted with minimal effectiveness during the guilt phase. On the basis of these palpably misleading arguments, the jury imposed death.

In reversing, the Ninth Circuit held: (a) "Bloom's defense was based upon his contention that he lacked the necessary mental capacity for premeditation." Bloom, 132 F.3d at 1270; (b) that being the case, shortly after his appointment, Edelberg sought a court order for appointment of a psychiatric expert. Id. at 1271; (c) "To support [Bloom's] defense . . . trial counsel [Edelberg] hired Arthur S. Kling., M.D., a psychiatrist." Id.; (d) Kling sought a wide variety of relevant background materials from Bloom's lawyer. Id. at 1272; (e) until the eve of trial, counsel did nothing to communicate with or prepare the expert for trial. Id.; (f) having reviewed a limited number of materials provided by Edelberg, and having interviewed Bloom for an hour and a half, Dr. Kling prepared a report which totally undermined Bloom's defense. Id. at 1273; (g) the state made excellent use of the report at trial, turning Dr. Kling into a witness for the prosecution. Id.; (h) with a minimal effort, Edelberg could have unearthed and provided to Dr. Kling a mountain of relevant social and mental health data. Id. at 1273. Such data included a psychiatric evaluation filed just months before the murders

opining that Bloom should be committed and evidence that during his incarceration respondent attempted to commit suicide and suffered from visual and auditory hallucinations. Id. at 1273-77.

The Ninth Circuit reached the following conclusion:

> The complete lack of effort by Bloom's trial counsel to obtain a psychiatric expert until days before trial, combined with counsel's failure to adequately prepare his expert and then present him as a trial witness, was constitutionally deficient performance. Counsel left the responsibility of obtaining and preparing this key witness to a third-year law student who, due to counsel's lack of diligence, had no idea what defense theory counsel intended to pursue. Because counsel did not acquire the services of this key witness until days before trial, a hurried and inaccurate report resulted. Presenting the witness at trial was a disaster. "Describing [counsel's] conduct as 'strategic' strips that term of all substance." Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994).

Bloom, 132 F.3d at 1277.

After finding that Dr. Kling had requested the material Edelberg could have, but did not, provide, the Court continued:

> We recognize that counsel should not be faulted for failing "'to track down every record that might possibly relate to [the defendant's] mental health'" Hendricks, 70 F.3d at 1038 (quoting Card v. Dugger, 911 F.2d 1494, 1512 (11th Cir 1990)). However, when the defense's only expert requests relevant information which is readily available, counsel inexplicably does not even attempt to provide it, and counsel then presents the expert's flawed testimony at trial, counsel's performance is deficient.

Bloom, 132 F.3d at 1278

REASONS FOR DENYING THE WRIT

When this Court ruled capital punishment constitutionally

permissible two decades ago it conditioned that ruling on the existence of a sophisticated process of adjudication ensuring that the ultimate penalty is imposed only after a careful consideration of the facts of the crime and the character of the defendant.[3] This case involves a sentence of execution arrived at by mess and muddle.[4] Implicit in the Ninth Circuit's opinion is the view that respondent, and society itself, are legally entitled to more. That decision is sound. Certiorari should be rejected.

I. CALIFORNIA HAS WAIVED ITS RIGHT TO RAISE THE TEAGUE ARGUMENT IN THIS COURT AND HAS NOT PRESENTED ADEQUATE GROUNDS FOR REVIEW

The Attorney General of California has frequently benefited from rules barring claims on procedural grounds. See e.g.,

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[3] "In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,' Woodson, 428 U.S., at 305, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." Penry v. Lynbaugh, 492 U.S. 302, 306 (1989).

[4] Counsel's performance not only was deficient, it was conflicted. When the Superior Court of Los Angeles appointed counsel to represent Bloom, it named Sherwin Edelberg, a member of the law firm -- Blatt, Edelberg & Marcus -- representing a jailhouse informant, Rodney Catsiff, who had been a principal witness against respondent at his preliminary hearing. The firm continued to represent both clients simultaneously for several months, during which time a deal was reached to provide benefits to Catsiff for his trial testimony against Bloom. The firm continued on respondent's case without ever informing him or the trial judge of the conflict.

The Ninth Circuit declined to reach the "conflict" issue, having ordered the District Court to grant Bloom's habeas petition as a result of his counsel's inadequate performance. 132 F.3d at 1278.

Calderon v. Kelly, 127 F.3d 782 (9th Cir. 1998)(state successfully sought writ of mandamus to compel district court to dismiss habeas corpus action as a result of Kelly's failure to file within time limits set by Antiterrorism and Effective Death Penalty Act, despite overwhelming evidence of his mental incapacity).

In the district court, the state raised many claims of procedural defaults. See e.g., Memorandum in Support of Answer to Second Amended Writ ("Memorandum I") at 50, 58 (argument relating to jury instruction at penalty hearing barred by Teague);[5] Memorandum I at 52 (instructional issue not exhausted); Supplemental Memorandum of Points and Authorities in Support of Answer ("Supplemental Memorandum") at 10 (jury misconduct claim barred by Teague); Memorandum in Support of Motion to Reconsider Petitioner's Motion to Amend ("Reconsideration") at 4 (competence claim untimely); Reconsideration at 9 (competence claim amounts to an abuse of the writ); Reconsideration at 14 (conflict claim amounts to an abuse of the writ); California's Brief on Appeal ("CBA") at 20, 36 (Bloom failed to exhaust his conflict claim); CBA at 31, 36-37 (conflict claim barred by Teague); CBA at 36 (conflict claim never raised and therefore waived).

The state now asks this Court to enter into a Teague review of one of the few issues as to which it raised no claim of procedural default in the District Court, i.e., whether respondent was deprived of his right to counsel as a product of

---

[5] Teague v. Lane, 489 U.S. 288 (1989).

his lawyer's complete failure to prepare a solitary expert witness. Because the state did not raise the issue at the appropriate time, Bloom had no opportunity to brief the issue in the District Court and, not surprisingly, in rejecting Bloom's ineffectiveness claim, the district court did not cite or rely on Teague. See Petition for Certiorari, Appendix B at 8-24.

In its Ninth Circuit brief, the Attorney General argued at length, as it had in the District Court, that respondent's conflict claim (CAB at 31, 37-38) and argument under Penry v. Lynaugh, 492 U.S. 302 (1989)(CAB at 76-77) were Teague-barred. Also, in a footnote, for the first time since the habeas petition was filed in federal court in 1990, the Attorney General extended its Teague argument to Bloom's incompetence claim. See CAB at 55 n.37.

The Ninth Circuit did not address this Teague argument, no doubt because the claim had never been presented to the District Court. See e.g. United States v. Clack, 957 F.2d 659 (9th Cir. 1992)(no review of claims raised for the first time on appeal); Federal Appellate Practice Guide, Ninth Circuit, § 10.11-10.12, citing cases.[6]

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[6] The Attorney General accuses the Ninth Circuit of "flout[ing] this Court's repeated procedural admonition that the lower federal courts first 'must' resolve the issue of the State's 'threshold' Teague defense before considering the merits of constitutional claims in habeas corpus cases." Cert. Pet. at 8. Given the state's failure to raise the Teague issue until its responsive brief in the Court of Appeal, years after Bloom's incompetence claim was submitted to the District Court, the Ninth Circuit might well have accused California itself of doing some "flouting." Rather, the Court of Appeal simply, and properly, ignored the claim.

Furthermore, the Teague claim presented here is not the one presented to the Ninth Circuit. There, California's Teague claim rested on Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995). Hendricks faulted his lawyer for failing to conduct an investigation of his "social history evidence relevant to . . . mental condition where there [is] an indication of mental disturbance and to provide such evidence to an expert in order for [his] condition to be properly evaluated." Id. at 1038.

The Ninth Circuit rejected Hendricks "investigation" claim, holding the lawyer had no affirmative duty to investigate: "In the absence of a specific request, an attorney is not responsible for gathering background material that might be helpful to a psychiatrist evaluating his client." CAB at 55-56, quoting Hendricks, 70 F.3d at 1038, quoting Bloom v. Vasquez, 840 F.Supp. 1362, 1370 (C.D.Cal. 1993)(emphasis added).

The District Court in Bloom had held that Dr. Kling had never asked Edelberg for extensive background materials on respondent's social and mental health history. 132 F.3d at 1277. The Attorney General's new Teague argument in the Ninth Circuit simply followed from that factual finding: for Bloom to prevail, the court would have to expand the duty discussed in Hendricks -- i.e., to investigate social history and provide that information to a mental health expert where there has been a request from the expert for the materials -- and such an expansion would amount to a new rule. See CAB at 55 n.37.

But the Ninth Circuit rejected the factual predicate upon

which the district court's ruling had turned, calling it "clearly erroneous." 132 F.2d at 1277. The Court of Appeal found Dr. Kling had made the request for social and mental health materials that was missing in Hendricks. Id. at 1277-78. The state did not challenge that ruling on rehearing or hearing en banc below, and does not dispute it here. Given the Circuit's factual finding, Bloom is entitled to relief under law embraced by the state which cannot possibly be characterized as "new."

Having lost its former Teague argument with the rejection of the District Court's key factual finding, the state is forced to alter its procedural claim here. Now, in an argument that is as confusing as it is procedurally barred, the state argues Bloom imposes a new duty upon defense counsel "to gather or choose material for a defense expert to consider in rendering his opinion" (Cert. Pet. at 10). The arguments contained in California's petition have never been raised before; no Teague claim at all was raised in the District Court. This Court should deny certiorari.

II. FOR PROCEDURAL AND SUBSTANTIVE REASONS, THE COURT SHOULD REJECT CALIFORNIA'S REQUEST TO "SETTLE" AN ALREADY WELL-SETTLED AREA OF LAW

At its core, this is not a particularly complicated case. Respondent's trial counsel pursued a mental state defense, hired an expert, but failed to prepare the expert for trial. That lack of groundwork led to a disastrous trial performance by the expert: "his testimony not only failed to help the defense, it significantly hindered it." 132 F.3d at 1278. The Court of

Appeals concluded that "had it not been for the deficient performance of Bloom's trial counsel, there is a 'reasonable probability' that the verdicts 'would have been different.'" Id., quoting Strickland, 466 U.S. at 694.

Fearing rejection of its new and substantiveless Teague claim on the first Strickland prong, the state now fashions out of whole cloth a "question" for review by this Court relating to the second Strickland prong. It asks this Court to hold that Strickland requires both a "showing of probable effect on the actual outcome of the trial [and] a determination that counsel's deficient performance rendered the trial fundamentally unfair or unreliable." Cert. Pet. at i.

Three responses are in order. First, California's second question falls within none of the appropriate grounds for certiorari contained in this Court's rules. Supreme Court Rule 10.

Second, its suggestion to the contrary notwithstanding (see Cert. Pet. at 16), California raised the Fretwell issue for the first time in the Ninth Circuit. The issue as presented here was not raised in the state's briefs in the District Court, nor was it addressed in the District Court's opinion.

Third, the state all but concedes there is no issue to be "settled" by this Court. It states, rather, that "certain aspects of [Lockhart v.] Fretwell[, 506 U.S. 364, 369 n.2 (1993)] lend themselves to arguments that the [Strickland] rule might still remain unsettled. Cert. Pet. at 14 (emphasis added). It

calls the rule "arguably ambiguous." Cert. Pet. at 15. Since the state itself cannot articulate a clear conflict in the law, the Court should expend its time on more pressing matters.

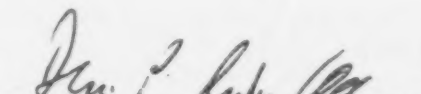
CONCLUSION

For the reasons stated, California's petition for a writ of certiorari should be denied.

Dated: April 23, 1998

Respectfully submitted,

RIORDAN & ROSENTHAL



BY: DENNIS P. RIORDAN

Attorneys for Respondent
ROBERT MAURICE BLOOM

97-1569

CERTIFICATE OF MAILING

Supreme Court Rules 29.2, 29.5(b)

I, Dennis P. Riordan, am a member of the Bar of the United States Supreme Court and represent Robert Maurice Bloom. To my knowledge, on April 23, 1998, Bloom's OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI to the Ninth Circuit Court of Appeals and Bloom's MOTION TO PROCEED IN FORMA PAUPERIS were deposited in the United States Post Office at Gough and Hayes Streets in San Francisco and was addressed to the Clerk of the United States Supreme Court and to the following parties with first class postage:

Robert C. Schneider, Esq.
Deputy Attorney General
300 South Spring Street, Room 5000N
Los Angeles, CA 90013

Robert Bloom
No. C-90300
Box C-90300
Tamal, CA 94974

As a result of this mailing all parties required to be served have been served.

Dated: April 23, 1998

Dennis P. Riordan, Esq.

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By: Sherry Alhawwash
SHERRY ALHAWWASH

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97-1569

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In the
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October Term, 1997

Arthur Calderon, Warden, ***Petitioner,***

v.

Robert Maurice Bloom, ***Respondent.***

On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

CERTIFICATE OF SERVICE

I am a member of the Bar of the United States Supreme Court. I certify that, on March 20, 1998, three copies of the accompanying Petition for Writ of Certiorari were mailed by depositing them in a United States mailbox, first-class postage prepaid, addressed to counsel for respondent as follows: Dennis P. Riordan, Esq., Riordan & Rosenthal, 523 Octavia Street, San Francisco, California 94102 [(415) 431-3472]; and that service thus has been accomplished on all parties in compliance with this Court's Rule 29.

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